

A Tesco Stores (M) Sdn Bhd v Ananda Kumar a/l Krishnan

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
P-02(W)-1404-08 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
16 MARCH 2017

C *Civil Procedure — Judgments and orders — Garnishee order — Application for garnishment order absolute — Whether in garnishee proceedings burden of proof would fall on garnishee to disprove owing money to judgment debtor — Whether judicial commissioner had wrongly exercised discretion of court — Whether appellate intervention was necessary*

D Ananda Kumar a/l Krishnan ('the respondent') had obtained a judgment for the principal sum of RM19,266,746.16 against LS Fishery Sdn Bhd ('the judgment debtor'). As the judgment remained unsatisfied, the respondent/judgment creditor instituted garnishment proceedings pursuant to O 49 of the Rules of Court 2012 against Tesco Stores (M) Sdn Bhd ('the appellant'), to attach all debts owing or accruing due from the appellant/garnishee to the judgment debtor. After obtaining an order to show cause or garnishee order nisi against the appellant, the respondent proceeded to serve the garnishee order nisi on the appellant and the judgment debtor. Despite being served with the order nisi on 22 October 2015, the appellant transferred RM670,243.23 to the judgment debtor on 23 October 2015, ie after the service of the order. The appellant then filed an affidavit stating that there was no amount due and owing from the appellant to the respondent. In response the respondent filed Form 100 pursuant to O 49 r 5 of the ROC disputing the appellant's assertion that there was no money due to the respondent. The High Court judge ordered that the dispute be set down for trial and that the affidavits filed be taken as pleadings. At the inter partes hearing for a garnishment order absolute, the appellant's accountant payable manager testified that the appellant owed the judgment debtor, Li Fishery Sdn Bhd, a sum of RM419,112.94 and the appellant's own documentary evidence showed that there were debts due to the judgment debtor from the appellant. It was the respondent's contention that as from the service of the garnishee order nisi, all debts owing or accruing from the appellant to the judgment debtor were attached because the respondent had acquired a right over them, entitling him to prevent the appellant from paying the judgment debtor. The judicial commissioner ('JC') found that the appellant as garnishee had the burden of proof to prove that there wasn't any debt due or accruing due to the judgment debtor and that the respondent did not have to show any evidence of a debt. As such, the High Court held that the appellant was liable to pay to the respondent the sum of RM3,179,014.47 in total with costs of RM10,000 and

ordered the garnishment order nisi to be made absolute. The appellant appealed against this decision and contended that the legal burden ought to be on the respondent/garnishor and not the appellant/garnishee.

A

Held, dismissing the appeal with costs of RM20,000:

B

- (1) In the instant case the appellant's memorandum of appeal and supplementary memorandum of appeal had not demonstrated that the appeal was an attack on the discretionary power of the court. The appellant had also not adduced any evidence to show how the discretion vested with the court had been wrongly exercised or whether the court had failed to take into consideration the relevant matters before it. This was fatal to the appellant's appeal (see paras 12 & 14(a)).

C

- (2) The instant case was not one where the appellant disputed its liability to pay the judgment debtor but instead disputed the quantum claimed. The issue of quantum had been tried by the JC, who after hearing both parties' evidence ie oral and documentary, concluded that the appellant was liable and had given the grounds for arriving at his decision. On the question as to whom the burden would fall, the JC had heard the evidence of both the parties and on the facts and evidence had come to the conclusion that there was a debt due and owing. That was to say, the issue of burden had become academic. Order 49 of the ROC gave the judge a wide discretion to decide the matter, which he had done (see paras 4 & 14).

D

E

- (3) It is well established that an appellate court would not intervene in the exercise of the discretionary powers of the court below unless it could be shown that the court had exercised its discretion on wrong principles or had failed to take into consideration relevant matters before it or had taken into consideration, consideration not before it. As the JC had properly exercised the discretionary power vested in the court, there was no reason for appellate intervention (see paras 8 & 14(d)).

F

G

[Bahasa Malaysia summary]

Ananda Kumar a/l Krishnan ('responden') telah mendapatkan penghakiman untuk jumlah utama sebanyak RM19,266,746.16 terhadap LS Fishery Sdn Bhd ('penghutang penghakiman'). Memandangkan penghakiman kekal tidak memuaskan, responden/pemiutang penghakiman memulakan prosiding garnisemen berikutan A 49 Kaedah-Kaedah Mahkamah 2012 terhadap Tesco Stores (M) Sdn Bhd ('perayu'), untuk menyertakan kesemua hutang yang perlu dibayar atau terakru daripada perayu/yang digarnis kepada penghutang penghakiman. Selepas mendapatkan perintah untuk menunjukkan tunjuk sebab atau perintah nisi garnis terhadap perayu, responden meneruskan untuk menyerahkan perintah nisi garnis ke atas perayu dan penghutang penghakiman. Meskipun diserahkan dengan perintah nisi pada 22 Oktober

H

I

- A 2015, perayu memindahkan RM670,243.23 kepada penghutang penghakiman pada 23 Oktober 2015, iaitu selepas penyerahan perintah tersebut. Perayu kemudiannya memfailkan affidavit menyatakan bahawa tidak terdapat jumlah wang terhutang dan yang kena dibayar daripada perayu kepada responden. Dalam menjawab responden memfailkan Borang 100
- B berikutan kepada A 49 k 5 KKM mempertikaikan penegasan perayu bahawa tidak terdapat wang yang kena dibayar kepada responden. Hakim Mahkamah Tinggi memerintahkan bahawa pertikaian ditetapkan untuk perbicaraan dan bahawa affidavit-affidavit diambil sebagai pliding. Pada pendengaran inter partes bagi perintah garnisemen mutlak, pengurus akaun kena bayar perayu
- C memberi keterangan bahawa perayu kena bayar penghutang penghakiman, Li Fishery Sdn Bhd, wang sejumlah RM419,112.94 dan keterangan dokumen perayu sendiri menunjukkan bahawa terdapat hutang kena dibayar kepada penghutang penghakiman daripada perayu. Ia adalah hujahan responden bahawa dari masa penyerahan perintah nisi garnis, kesemua hutang yang kena
- D dibayar atau terakru daripada perayu kepada penghutang penghakiman adalah disertakan kerana responden telah mendapatkan hak ke atas mereka, memberikannya hak untuk menghalang perayu daripada membayar penghutang penghakiman. Pesuruhjaya kehakiman ('PK') mendapati bahawa perayu sebagai yang digarnis mempunyai beban pembuktian untuk
- E membuktikan bahawa langsung tidak terdapat apa-apa hutang yang kena dibayar atau terakru kepada penghutang penghakiman dan bahawa responden tidak perlu untuk menunjukkan apa-apa keterangan mengenai hutang. Dengan itu, Mahkamah Tinggi memutuskan bahawa perayu bertanggungjawab untuk membayar kepada responden jumlah
- F keseluruhannya sebanyak RM3,179,014.47 dengan kos sebanyak RM10,000 dan memerintah perintah nisi garnisemen dibuat sebagai mutlak. Perayu merayu terhadap keputusan ini dan berhujah bahawa beban perundangan perlu terletak ke atas responden/penggarnis dan bukan perayu/yang digarnis.
- G **Diputuskan**, menolak rayuan dengan kos sebanyak RM20,000:
- (1) Dalam kes ini memorandum rayuan dan memorandum tambahan rayuan perayu telah menunjukkan bahawa rayuan adalah serangan ke atas kuasa budi bicara mahkamah. Perayu juga tidak mengemukakan
- H apa-apa keterangan untuk menunjukkan bagaimana budi bicara diletakkan kepada mahkamah telah dijalankan secara salah atau sama ada mahkamah telah gagal untuk mengambil pertimbangan perkara-perkara relevan di hadapannya. Ini adalah serius kepada rayuan perayu (lihat perenggan 2 & 14(a)).
- I (2) Kes ini adalah bukan yang satu di mana perayu mempertikaikan liabilitinya untuk membayar penghutang penghakiman tetapi sebaliknya mempertikaikan kuantum yang dituntut. Isu kuantum telah dibicarakan oleh PK, yang selepas mendengar keterangan kedua-dua iaitu lisan dan dokumentar, memutuskan bahawa perayu bertanggungjawab dan telah

memberikan alasan untuk mencapai kepada keputusannya. Atas soalan siapa yang menanggung beban, PK telah mendengar keterangan kedua-dua pihak dan atas fakta dan keterangan telah mencapai kepada kesimpulan bahawa terdapat hutang yang kena dibayar. Dengan itu, isu beban telah menjadi akademik. Aturan 49 KKM memberikan hakim budi bicara yang luas untuk memutuskan perkara tersebut, yang mana beliau telah lakukan (lihat perenggan 4 & 14).

A

B

- (3) Adalah terbukti bahawa mahkamah rayuan tidak akan campur tangan dalam menjalankan kuasa budi bicara mahkamah bawahan kecuali ia dapat ditunjukkan bahawa mahkamah telah menjalankan budi bicaranya atas prinsip yang salah atau telah gagal untuk mengambil kira perkara relevan di hadapannya atau telah mengambil kira, pertimbangan yang bukan di hadapannya. Memandangkan PK telah menjalankan secara betul kuasa budi bicara yang diletakhakkan dalam mahkamah, tidak ada alasan untuk campur tangan mahkamah rayuan (lihat perenggan 8 & 14(d)).]

C

D

Notes

For cases on garnishee order, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5614–5618.

E

Cases referred to

Ananda Kumar all Krishnan lwn Ng Chin Tai (trading in the name and style of Lean Seh Fishery) [2015] MLJU 688; [2015] 1 LNS 912, HC (refd)

F

DIC (Malaysia) Sdn Bhd v Precise Solution Sdn Bhd and Jenama Evolusi Sdn Bhd (garnishee) [2010] MLJU 516, HC (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, CA (refd)

Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457, FC (refd)

G

Pernas Trading Sdn Bhd v Senali Construction Works Sdn Bhd & Anor [1991] 3 CLJ Rep 439, HC (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)

H

The State-Owned Company Yugoimport Sdpr (Also Known As Yugoimport-Sdpr) v Westacre Investments Inc and Other Appeals [2016] 5 SLR 372, CA (refd)

Legislation referred to

I

Evidence Act 1950

Rules of Court 2012 O 49, O 49 r 1, 1(3)

Appeal from: Civil Suit No 22–413 of 2010 (High Court, Pulau Pinang)

- A *Shaikh Abdul Saleem (Gurmeet Kaur with him) (Shaikh David Raj) for the appellant.*
AG Kalidas (Doris G Mayappen with him) (K Nadarajah & Partners) for the respondent.

B **Hamid Sultan JCA (delivering judgment of the court):**

- C [1] The appellant/garnishee appeal is against the decision of the learned trial judge who had after full trial in a garnishee proceeding held that the garnishee is liable to pay the respondent/garnishor the sum of RM3,179,014.47 etc; and ordered the garnishment order nisi to be made absolute.

- D [2] It is not in dispute that the learned trial judge had taken the position that the burden of proof to prove that there is no debt due or accruing to the judgment debtor ('JD') lies with the garnishee, notwithstanding the garnishor did not provide any particulars on his belief. Such an approach may not be correct in law (see *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457). The learned trial judge to arrive at the proposition had relied on the following cases, namely: (i) *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457; (ii) *DIC (Malaysia) Sdn Bhd v Precise Solution Sdn Bhd and Jenama Evolusi Sdn Bhd (garnishee)* [2010] MLJU 516; and (iii) *Pernas Trading Sdn Bhd v Senali Construction Works Sdn Bhd & Anor* [1991] 3 CLJ Rep 439.

- F [3] The learned counsel for the appellant asserts that the legal burden remained on the garnishor and not the garnishee in reliance of the Singapore Court of Appeal decision in the case of *The State-Owned Company Yugoimport Sdpr (Also Known As Jugoimport-Sdpr) v Westacre Investments Inc and Other Appeals* [2016] 5 SLR 372.

- H [4] What is important to note in this case on the question as to whom the burden falls is that the learned trial judge had heard the evidence of both the parties and on the facts and evidence came to the conclusion that there is a debt due and owing. That is to say, the issue of burden has become academic. Whether there is a debt due or had accrued at times may be a debatable issue. However, O 49 itself gives the discretionary power to the judge to decide on the issue. The learned trial judge had written a speaking judgment to justify his conclusion. We do not wish to repeat the facts and the evidence as it had been dealt by the learned judge and reported as *Ananda Kumar a/l Krishnan lwn Ng Chin Tai (trading in the name and style of Lean Seh Fishery)* [2015] MLJU 688; [2015] 1 LNS 912. This judgment must be read together with that judgment to appreciate our reasoning in the proper perspective.

PRELIMINARY JURISPRUDENCE ON O 49

A

[5] Order 49 is a recognised summary procedure for a judgment creditor ('JC') to attach debt due or accruing but not due, owed to the JD by some other person often referred to as garnishee. That is to say, if the garnishee is obliged to pay the money to the JD, that sum can be attached by garnishee proceeding. It will relate to debts due or accrued. However, garnishee proceedings has been widely used to attach deposits and cash in bank accounts, etc. as provided for in O 49 r 1(3), and such attachment procedure is quite straight forward in contrast to determining whether or not there is a debt due or accrued. The procedure set out in O 49 has been explained by His Lordship Suriyadi FCJ in *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457 as follows:

B

C

[33] Procedurally, garnishee proceedings begin with the filing of an ex parte notice of application, supported by an affidavit in Form 98 (O 49 r 2). The affidavit will identify the judgment or order to be enforced, the amount remaining unpaid under the judgment or order at the time of the application, with the garnishee identified, and the applicant stating his belief that the garnishee is within the jurisdiction and is indebted to the judgment debtor.

D

[34] At this stage, the burden is on the garnishor, but without any opposition facing it, the latter invariably succeeds. As said earlier at para 5 an order successfully obtained pursuant to this ex parte application order will be in Form 97 and is an order to show cause (garnishment order nisi).

E

[35] Despite the garnishment order nisi not being an absolute order, O 49 r 3(2) legislates that this order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in it (*Wearne Brothers Malaysia Sdn Bhd v Gurdave Kaur & Anor*; *Baharuddin, Bernatt, Tan & Ker (As Garnishees)* [1982] 1 MLJ 23). Generally, once the garnishee is served with the order, the debt is charged, and he '... cannot pay the debt to anybody but the garnishor without incurring the risk of having to pay it all over again' (*Galbraith v Grimshave and Baxter* [1910] 1 KB 339; *Nadikatly Anjana v Bandi Ramakrisna* (1971) 1 Audh WR 832). This provision is the mainstay of the appellant's case.

F

G

[36] To make it absolute O 49 r 4(1) of the RHC, which must be read together with O 49 r 3 of the RHC, must first be complied with. For purposes of this second stage ie in order to obtain the order absolute, the garnishment order nisi must first be served personally on the garnishee and also on the judgment debtor, unless directed otherwise. A return date is given, seven days after service, whereupon the garnishee attends a hearing in order to show cause, why he should not pay the judgment creditor the debt due from him to the judgment debtor. At the conclusion of the hearing the garnishment order nisi is either made absolute or not.

H

I

[37] In order to obtain a garnishment order nisi or an order absolute, the court must be convinced that the debt of the garnishee to the JD must relate to any debt due or accruing due to the judgment debtor. 'Any debt due or accruing due' is not exactly easy to understand, and as Jackson J in *Bank of Montreal v IM Krisp Foods Ltd* (1996) 6 CPC (4th) 90 (CA) said:

- A Few phrases have been as problematic to define as ‘debt due or accruing due’. The *Shorter Oxford English Dictionary*, 3rd ed defines ‘accruing’ as ‘arising in due course’, but an examination of English and Canadian authority reveals that not all debts ‘arising in due course’ are permitted to be garnished ...
- B [6] Learned authors of *Malaysian Civil Procedure 2015*, Vol 1 p 646, on the history of the rule, inter alia, says:
- C As soon as the garnishee order nisi is served on the garnishee, it operates as an injunction, ie it binds the debt in the hands of the garnishee, that is, it creates a charge in favour of the judgment creditor; the money is then said to be ‘attached’. The word ‘attached’ is also derived from the Norman-French. But the ‘attachment’ is not an order to pay, but only freezes the sum in the hands of the garnishee until the second step where the order is made absolute or is discharged. Only if the said order is made absolute is the garnishee liable to pay. See *Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] QB 149, CA (Eng).
- D
- E [7] What is significant of O 49 is that it gives a wide discretion to the court to determine summarily or by way of hearing, attaching less significance to the Evidence Act 1950 or full trial procedure. What the court is required to make is orders which it thinks is just. That is to say, O 49 r 1 does not impose the garnishor or garnishee to establish the case on the balance of probabilities. O 49 r 1 gives the court the discretion to decide the matter. O 49 is a rule relating to discretionary power of the court. Order 49 states as follows:
- F 1 Attachment of debt due to judgment debtor (O 49, r 1)
- G (1) Where a person (who is referred to as ‘the judgment creditor’ in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as ‘the judgment debtor’ in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as ‘the garnishee’ in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
- H
- I (2) An order in Form 97 under this rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order mentioned in that paragraph and the costs of the garnishee proceedings.

- (3) In this Order, 'any debt due or accruing due' includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

A

2 Application for order (O 49, r 2)

An application for an order under rule 1 shall be made ex parte by a notice of application supported by an affidavit in Form 98 —

B

- (a) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application; and
- (b) stating that to the best of the information or belief of the deponent the garnishee (naming him) is within the jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent's information or the grounds for his belief.

C

3 Service and effect of order to show cause (O 49, r 3)

D

- (1) An order under rule 1 to show cause shall, at least seven days before the time appointed thereby for the further consideration of the matter, be served —
- (a) on the garnishee personally; and
- (b) unless the Court otherwise directs, on the judgment debtor.
- (2) Such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified.

E

4 No appearance or dispute of liability by garnishee (O 49, r 4)

F

- (1) Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may, subject to rule 7, make an order absolute in one of the forms in Form 99 under rule 1 against the garnishee.
- (2) An order absolute under rule 1 against the garnishee may be enforced in the same manner as any other order for the payment of money.

G

5 Dispute of liability by garnishee (O 49, r 5)

Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 100 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without, if it orders trial before the Registrar, the need for any consent by the parties.

H

I

6 Claims of third persons (O 49, r 6)

- (1) If in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien

- A** upon it, the Court may order that person to attend before the Court and state the nature of the claim with particulars thereof.
- B** (2) After hearing any person who attends before the Court in compliance with an order under paragraph (1), the Court may summarily determine the questions at issue between the claimants or make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in paragraph (1) be tried in such manner as is mentioned in rule 5.
- 7 Judgment creditor resident outside scheduled territories (O 49, r 7)
- C** (1) The Court shall not make an order under rule 1 requiring the garnishee to pay any sum to or for the credit of any judgment creditor resident outside the scheduled territories unless that creditor produces a certificate that the Controller has given permission under the Exchange Control Act 1953 for the payment unconditionally or on conditions which have been complied with.
- D** (2) If it appears to the Court that payment by the garnishee to the judgment creditor will contravene any provision of the Exchange Control Act 1953, it may order the garnishee to pay into Court the amount due to the judgment creditor and the costs of the garnishee proceedings after deduction of his own costs, if the Court so orders.
- E** 8 Discharge of garnishee (O 49, r 8)
- F** Any payment made by a garnishee in compliance with an order absolute under this Order, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.
- 9 Money in Court (O 49, r 9)
- G** (1) Where money is standing to the credit of the judgment debtor in Court, the judgment creditor shall not be entitled to take garnishee proceedings in respect of that money but may apply to the Court by a notice of application for an order that the money or so much thereof as is sufficient to satisfy the judgment or order sought to be enforced and the costs of the application be paid to the judgment creditor.
- H** (2) On issuing a notice of application under this rule, the applicant shall produce the application at the office of the Accountant General and leave a copy at that office, and the money to which the application relates shall not be paid out of Court until after the determination of the application.
- I** If the application is dismissed, the applicant shall give notice of that fact to the Accountant General.
- (3) Unless the Court otherwise directs, the notice of application shall be served on the judgment debtor at least seven days before the day named therein for the hearing of it.

- (4) Subject to Order 70, rule 23, the Court hearing an application under this rule may make such order with respect to the money in Court as it thinks just.

A

10 Costs (O 49, r10)

The costs of any application for an order under rule 1 or 9, and of any proceedings arising therefrom or incidental thereto, shall, unless the Court otherwise directs, be retained by the judgment creditor out of the money recovered by him under the order and in priority to the judgment debt.

B

[8] It is well established that an appellate court will not intervene in the exercise of the discretionary powers of the court below unless it can be shown that the court has exercised its discretion on wrong principles or has failed to take into consideration relevant matters before it or has taken into consideration, consideration not before it. Support for the proposition is found in a number of cases. In *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35, the Court of Appeal asserted:

C

D

(b) It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where appellate interference is warranted (see *Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v Raja Segaran all S Krishnan* [2002] 3 MLJ 155).

E

(See *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62.)

F

[9] Learned author of *Malaysian Civil Procedure 2015* at p 652 on O 49 r 1 and the discretionary power of the court had this to say:

G

the Court may — As this rule contains the word ‘may’ a judicial discretion vest in the court which determines whether a garnishee order *nisi* will be made absolute unless the garnishee has successfully disputed liability. A garnishee order is basically an equitable remedy. Generally, the courts will refuse this form of equitable remedy if the effect would be to cause undue preference amongst all creditors, to protect the position of other creditors (*Prichard v Westminster Bank Ltd* [1969] 1 All ER 999). If there is doubt whether the estate of the deceased is insolvent, the money in the hands of the garnishee should be ordered to be paid into court, pending an inquiry whether or not the estate is insolvent. It is pertinent to note that in *George Lee & Sons (Builders) Ltd v Olink* [1972] 1 All ER 359, the court ruled that an order should not be made absolute if there is real uncertainty about the solvency of the debtor’s estate. See *Labtec Sdn Bhd v Resilient Construction Sdn Bhd* [1992] 2 MLJ 853, where it was held that a Mareva injunction was granted not to improve the position of the judgment creditor as against other debtors by giving him priority over the assets of the judgment debtor nor to prevent him from paying debts as they fell. The Mareva injunction also did not prevent the judgment creditor from seeking relief under

H

I

- A RHC 1980 O 49 r 1.
- B Where it would be unjust or unfair to make an order *nisi* absolute, the courts will refuse the making of an order absolute. Inequity to the garnishee has been found to result where an order concerned a debt due to the judgment debtor and another jointly thereby causing the debt to be unattachable under the old RSC 1957. See *Ramalingam s/o Muthusamy v Chong Kim Fong etc* [1978] 1 MLJ 83. Refer also to para 49/1/12.
- C The order absolute will be refused where it would be inequitable or unfair, eg where the garnishee would still be liable in a foreign court, that is exposed to the risk of double liability which is ‘real or substantial’ (*Martin v Nadel* [1906] 2 KIJ 26).
- D The case of *Martin v Nadel* (above) was distinguished on its facts in the case of *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673. In the case of *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833, it was held that it is ‘a risk at fairly low level’ that the garnishee would have to pay the debt twice.
- E *In considering whether or not to exercise its discretion to make absolute a garnishee order, the court will want to ensure that justice is done not only as between parties, but also to any other person who may be affected by the order. Hence, the court must bear in mind not only the position of the judgment creditor, the judgment debtor and garnishee, but also the position of the other creditors of the judgment debtor. The court will take into account the fact that proceedings are on foot for ensuring the distribution of the available assets of the judgment debtor among the creditors pari passu* (see *D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd* [1975] 2 All ER 814; cited in *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821). (Emphasis added.)
- F

BRIEF FACTS

- G [10] The brief facts of the case as well as the grounds of the decision have been summarised before us and, inter alia, read as follows. We found that the summary, though rudimentary in nature, is sufficient to repeat verbatim to save court’s time:

INTRODUCTION

- H On 11.9.2015, the Judgment Creditor (Respondent) obtained judgment against the Judgment Debtor (LS Fishery Sdn Bhd) for the principal sum of RM19,266,746.16. As the judgment remained unsatisfied, the Judgment Creditor instituted these garnishment proceedings (amongst others) against the garnishee (Appellant) for attaching all debts owing or accruing due from the garnishee to the Judgment Debtor.

- I BACKGROUND FACTS

The Respondent had filed a Garnishment Proceedings pursuant to Order 49 of the Rules of Court 2012 and on 21.10.2015, without any opposition at the ex parte hearing, was successful in obtaining an order to show cause called a garnishee order nisi against the Appellant.

The garnishee order nisi was served on the garnishee and the Judgment Debtor. The service on the garnishee was carried out on 22.10.2015 at 4.20 p.m. As from the service of the garnishee order nisi, all debts owing or accruing from the garnishee to the Judgment Debtor are attached. As a result, the Judgment Creditor acquires a right over them, entitling to prevent the garnishee from paying his creditor (Judgment Debtor).

The Court finds that the contention of the learned counsel for the garnishee is untenable and unsustainable. The Question of on whom the burden of proof resides is not so much determined by whether a party is the judgment creditor or garnishee, but by the particular issue in the case itself. The Judgment Creditor received its order nisi based on an ex parte summons supported by affidavit. In this case, the supporting evidence was tested at the trial. Many documents were adduced and referred. It is the garnishee who is disputing that there is a debt due or accruing due from it to the Judgment Creditor. It is clear that the burden of proof is on the garnishee to prove that there is no debt due or accruing due to the Judgment Debtor.

The Court also finds that it is the burden of the garnishee to convince this Court at the inter partes hearing that at the time when the garnishee order nisi was granted, there was no actionable debt pending. Thus, in this case the garnishee had failed to convince this Court that there was no debt due or accruing due to the Judgment Debtor from them.

FINDINGS OF THE HIGH COURT

By applying the principles in *O'Driscoll and Another Vs Manchester Insurance Committee* [1915] 3 KB 499 and *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457, the Court finds that there are debts due and debt accruing due to the Judgment Debtor from the garnishee at the time when the ex parte garnishee application which culminated in the garnishment order nisi was heard on 21.10.2015 and was served on the garnishee on 22.10.2015.

The Court takes cognizance of the undisputed fact that the garnishee was served with order nisi on 22.10.2015, nevertheless the garnishee did transfer RM670,243.23 to the Judgment Debtor on 23.10.2015, after the service of the order. The debt was in existence at the date of attachment which becomes operative. The order nisi operates to bind the garnishee. Since the payment made out after the service of the order nisi, the garnishee is liable to pay the sums again to satisfy the attachment.

The garnishee's witness, En Khiril Anuar who is an accountant payable manager has admitted in his evidence that the garnishee owes the Judgment Debtor, Li Fishery Sdn Bhd, a sum of RM419,112.94.

The Court finds that the garnishee's own documentary evidence of P133 (p 16 of Bundle of documents marked HA) which is the account summary of the Judgment Debtor prepared by the Tesco Finance Department clearly shows that their purchase from 5th to 11th October 2015 amounting to RM638,758.05; the purchase from 12th to 18th October 2015 amounting to RM466,675.43; and the purchase from 19th to 25th October 2015 amounting to RM360,667.40. This evidence has been further confirmed by the garnishee's own witness Ms. Angie Ng Chai Hui who admitted as to the purchase from the Judgment Debtor from 5th till 25th October

A

B

C

D

E

F

G

H

I

- A 2015 and no evidence to show that they made the payments. Therefore, there are debts due to the Judgment Debtor from the garnishee.
- Was the garnishee then entitled to deduct fixed rebates, cost recovery and allowances from any debt due or accruing due?*
- B Although it seemed clear that the garnishee was entitled in law to avail itself any set-off or counter claim existing prior to the garnishee order nisi being served, but the contract Supplier's Trading Agreement (P136) between the garnishee and the Judgment Debtor made no provision for allowing the garnishee to make deductions for guaranteed rebates, cost recovery and allowance. The evidence of Ms. Angie Ng Chai Hui shows that the Supplier's Trading Agreement does not entitle Tesco to deduct rebates and cost recovery. Furthermore, P136 contains express provision in
- C Clause 9.1 where it states that 'no variation hereof shall be effective unless made by the parties hereto in writing'. No evidence led by the garnishee to show that they are legally allowed to make any deductions and more so, no written documentary evidence adduced.
- D Thus, the common law right to make such deductions is excluded by necessary implication as found in Clause 9.1 of the Supplier's Trading Agreement.
- Whether this Court can grant an order absolute although the amount payable to be garnished was not stated in the ex parte application?*
- E The answer is in the affirmative. It is important to note that 'in many cases, the judgment creditor will not have the knowledge in any detailed way of who owes what sums to the judgment debtor. Thus, the law has long recognised that a relatively relaxed or informal assertion that the third party owes money to the judgment debtor should suffice; relaxed, that is, relative to the strictness with which other material facts are expected or required to be proved' — *Alawiye and Another v Mahmood (trading as Amsons) and Another* [2005] EWHC 277 (CH).
- F *Whether the Judgment Creditor is allowed to question and challenge contractual relationship between garnishee and the Judgment Debtor, in the absence of the Judgment Debtor?*
- G There is no merit at all on this issue because the garnishee is the one who brought contractual documents between the garnishee and the Judgment Debtor in support of their case. The opposing party has every right to question and challenge the contents of the documents and may also use in their support if it is favourable to the case.
- H The whole process of this garnishee proceeding is to see whether there is debt due or accruing due from the garnishee to the judgment debtor and to make a finding that the garnishee order nisi to be made absolute. The Judgment Debtor is entitled to appear during the hearing and object to make the order absolute and he may submit if he wants to.
- I The Judgment Debtor did not attend before this Court to state his objection to the garnishee order nisi being made absolute. The Judgment Debtor may have his right to apply to set aside the garnishee order nisi. Nothing was done by the Judgment Debtor.

CONCLUSION

After considering the submission by the parties and having the law and evidence before the Court, the Court is satisfied that the application should be allowed and made the garnishment order absolute. The garnishee is liable to pay to the Judgment Creditor the sum of RM3,179,014.47 in total and cost of RM10,000.00 to be paid by the garnishee to the Judgment Creditor.

A

B

[11] What is important to note in this case is that the JC's ex parte application with the affidavit was not challenged by the respondent as provided in O 49 of the RC 2012. In addition, after the ex parte order was served, the garnishee has proceeded to make adjustments in the account purportedly on the basis they are entitled to do so, to the detriment of judgment creditor, and asserting that it is part of their trade practice. No evidence of such practice in the past was also tendered in evidence during trial. In addition, the agreement for supply of fish, etc between the garnishee and the judgment debtor was tendered in evidence and marked as exhibit with no objection. The agreement too does not provide for deduction.

C

D

[12] The memorandum of appeal and the supplementary memorandum of appeal of the appellant do not demonstrate that the appeal is an attack on the discretionary power of the court and, inter alia, reads as follows:

E

1. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira fakta bahawa Responden gagal mematuhi peruntukan Aturan 49 Kaedah 2 Kaedah-Kaedah Mahkamah 2012 di mana Responden perlu menunjukkan berdasarkan setakat maklumat atau kepercayaan terbaik deponen bahawa Perayu adalah berhutang kepada Penghutang Penghakiman dan Responden perlu menunjukkan sumber maklumat deponen atau alasan bagi kepercayaannya.

F

2. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa beban bukti terletak pada Perayu semasa gagal mengambil kira bahawa Responden tidak melepaskan beban bukti Responden untuk menunjukkan Perayu adalah berhutang kepada Penghutang Penghakiman dalam permohonan Responden selaras dengan Aturan 49 Kaedah 2 Kaedah-Kaedah Mahkamah 2012.

G

3. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira affidavit-afidavit yang ditukar oleh pihak-pihak semasa tunjuk sebab hanya merujuk kepada amaun yang dipertikaikan sebanyak RM99,532.92 dan bukannya jumlah yang terkandung dalam Perintah Garnisi Mutlak dan yang kemudiannya dirayu terhadap oleh Perayu di sini.

H

I

4. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira bahawa jumlah yang terhutang mesti setakat tarikh penyampaian Perintah Nisi

- A disampaikan dan Responden telah gagal untuk menunjukkan kewujudan hutang yang boleh diambil tindakan ('actionable debt') yang terakru pada tarikh penyampaian tersebut.
- B 5. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila menyalah anggap keputusan kes MITCO dalam memutuskan bahawa dalam presiding gamisi, beban bukti terletak pada Orang Yang Digarnis/Perayu tanpa mengambil kira sama ada Orang Yang Digarnis/Perayu telah menunjukkan dengan tepat bahawa sememangnya terdapat hutang yang terakru oleh Orang Yang Digarnis/Perayu kepada Responden.
- C 6. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila menyalah anggap keputusan kes MITCO dan gagal untuk mengambil kira prinsipal-prinsipal keadilan asasi ('natural justice') dalam memutuskan bahawa Orang Yang Digarnis/Perayu mempunyai beban bukti untuk menunjukkan kewujudan hutang walaupun tiada butir-butir atau keterangan yang ditunjukkan oleh Responden.
- D 7. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira arahan-arahan yang diberikan semasa pengurusan kes bahawa affidavit-afidavit yang difailkan dalam presiding garnisi akan diambil sebagai pliding dan Responden dalam affidavit-afidavit yang difailkan oleh Responden telah gagal untuk menunjukkan dokumen atau butir-butir untuk menyokong alegasi kewujudan hutang yang terakru oleh Orang Yang Digarnis/Perayu setakat tarikh penyampaian.
- E 8. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira dan mempertimbangkan keterangan Responden yang mengakui bahawa alegasi hutang yang terhutang oleh Perayu kepada Penghutang Penghakiman adalah berdasarkan kepada andaian sendiri Responden dan pengiraan-pengiraan yang bukan berdasarkan keterangan dokumen atau fakta.
- F 9. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta dalam memutuskan memihak kepada Responden tanpa mengambil kira fakta bahawa Penghutang Penghakiman telah membuat bayaran sebanyak RM154,558.22 selepas penyampaian Perintah Nisi atas dasar bayaran berlebihan yang dibuat oleh Perayu kepada Penghutang Penghakiman
- G 10. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa RM670,242.43 adalah hutang yang terakru kepada Penghutang Penghakiman tanpa mengambil kira fakta bahawa Perintah Nisi hanya disampaikan kepada Perayu pada jam 4petang 22.10.2015 dan fakta bahawa keterangan dokumentasi yang tidak dipertikaikan bersama-sama dengan keterangan saksi menunjukkan Perayu telah sebelum penerimaan
- H
- I

- Perintah tersebut telah mengarahkan bayaran dibuat kepada Penghutang Penghakiman pada jam pagi hari yang sama iaitu 22.10.2015 dan ianya terlalu lambat untuk Perayu membatalkan transaksi tersebut pada 23.10.2015. **A**
11. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa RM419,112.94 adalah jumlah terhutang kepada Penghutang Penghakiman dengan menyalah anggap keterangan saksi WG2B sebagai pengakuan kepada jumlah tersebut di mana sebenarnya tiada pengakuan seperti begitu dibuat oleh WG2B. **B**
12. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila jumlah RM419,112.94 adalah jumlah terhutang kepada Penghutang Penghakiman dengan gagal mengambil kira bahawa jumlah tersebut tidak mengambil kira terma-terma dagangan ('trading terms') di antara Penghutang Penghakiman dan Perayu yang akan menjadi penolakan ('deductions') kepada jumlah tersebut. **C**
13. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa RM1,466,100.88 adalah jumlah terhutang kepada Penghutang Penghakiman sekadar hanya bergantung kepada jumlah barangan yang dibeli oleh Perayu daripada Penghutang Penghakiman tanpa mengambil kira keterangan bahawa bayaran adalah dibuat oleh Perayu kepada Penghutang Penghakiman pada kadar bulanan selepas mengambil kira penolakan yang dipersetujui di antara Perayu dan Penghutang Penghakiman. **D**
14. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa RM1,466,100.88 adalah jumlah terhutang kepada Penghutang Penghakiman sekadar hanya bergantung kepada jumlah barangan yang dibeli oleh Perayu daripada Penghutang Penghakiman tanpa mengambil kira keterangan yang tidak dipertikaikan bahawa terdapat pelbagai penolakan seperti rebat, pulangan kos ('cost recovery') dan elaun di mana Perayu adalah berhak kepada. **E**
15. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila mentafsirkan terma-terma Perjanjian Dagangan Pembekal ('Supplier Trading Agreement') tanpa mengambil kira dan mempertimbangkan fakta bahawa Penghutang Penghakiman dan Perayu adalah berhak untuk keluar ('depart') daripada mana-mana perjanjian bertulis tanpa memperolehi persetujuan daripada Responden. **F**
16. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila mentafsirkan terma-terma Perjanjian Dagangan Pembekal tanpa mengambil kira fakta bahawa **G**
- H**
- I**

- A** Penghutang Penghakiman dan Perayu mungkin ada perjanjian berlainan daripada perjanjian bertulis yang dimasuki oleh pihak-pihak.
- B** 17. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa Responden adalah berhak untuk memasuki posisi Penghutang Penghakiman ('step into the shoes') dalam prosiding garnisi untuk meneliti dan meminda terma dan perjanjian kontrak yang Penghutang Penghakiman telah bersetuju sebelum ini.
- C** 18. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa seorang Pemiutang Penghakiman dalam prosiding garnisi mempunyai hak untuk mempersoalkan dan mengubah perjanjian yang telah sebelum ini dimasuki oleh Penghutang Penghakiman dan pihak ketiga.
- D** 19. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan memihak kepada Responden tanpa mengemukakan sebarang keterangan daripada Penghutang Penghakiman.
- E** 20. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan memihak kepada Responden tanpa mengambil kira dan menerima keterangan-keterangan Perayu yang tidak dipertikaikan oleh Responden.

[13] The executive summary of the appellant reads as follows:

- F** 1. This appeal stems from the decision of the High Court in Penang entering order absolute ['Order Absolute'] against the Appellant ['Tesco']. This Order Absolute was entered pursuant to a garnishee trial under Order 49 rule 5 of the Rules of Court 2012 ['ROC'].
- G** 2. In the ex parte application for a garnishee order nisi the Respondent stated in general that he believed that all the garnishees (22) were within the jurisdiction and is indebted to the Respondent. Neither the basis for the belief nor the particulars for the indebtedness were provided in the application and affidavit. Order Nisi was granted ex parte.
- H** 3. Prior to the hearing on 8.12.2015 before the High Court Judge Y.A. Dato' Nordin, Tesco vide affidavit affirmed by Ng Chai Hui on 1.12.2015 stated that there was no amount due and owing from Tesco to the Respondent.
- I** 4. Unbeknownst to Tesco, the Respondent filed Form 100 pursuant to Order 49 rule 5 ROC disputing Tesco's assertion that there was no money due to the Respondent. The Learned Judge without giving an opportunity for Tesco to respond to the Form 100, ordered that the dispute be set down for trial and that the affidavits filed be taken as pleadings.
5. Trial was before the Judicial Commissioner Abdul Wahab bin Mohamed whose decision is the subject of the appeal herein. The main basis of his reasoning/propositions in law:

The garnishee has the burden of proof to prove that there isn't any debt due or

accruing due to the judgment debtor and this burden of proof falls on the garnishee despite the fact that the garnishor did not provide any particulars on his belief or even an amount at the ex parte garnishee nisi stage.

A

6. The Judicial Commissioner accepted that the Respondent did not have to show any evidence of a debt as the burden was on Tesco. However, he failed to take into account evidence by Tesco that there was no amount due to the JD at the time the Order Nisi was served. He also failed to take into account the fact that the JD had in fact paid Tesco the sum of RM154,558.22 on 20.11.2015 (after the Order nisi). This on its own is clear and incontrovertible evidence that as of the date of the Order nisi, there was no debt owed by Tesco to the JD.

B

Net Effect of the Decision

C

7. This decision has made the provisions of the Evidence Act 1950 redundant in garnishee proceedings. It has created an absurd position to which was never the intention of Order 49 RHC. If this decision is upheld would elevate the legal position of a party who holds a judgment higher than any other civil litigant.

D

8. Based on this decision, any judgment creditor with a judgment is able to issue a generic affidavit against the world at large ie against any party who the judgment creditor 'believes' to be indebted to the judgment debtor without offering any evidence to substantiate that belief. The judgment creditor's burden of proof ends at this ex parte garnishee nisi stage. Once an order nisi is granted ex parte, any party then served with it will have to bear the burden of disproving that there is a debt due to the judgment debtor. In effect, the garnishee will have to prove a negative and in proving the negative, the judgment creditor is at liberty to make bare attacks against any evidence put forth.

E

9. We submit that this is not sound as it leads to abuse and injustice.

F

Case Law

10. The Judicial Commissioner relied upon a number of authorities mainly *Malaysia International Trading Corp Sdn Bhd v RHB Bank* [2016] 2 MLJ 457 for general principles and *DIC (Malaysia) Sdn Bhd v Precise Solution Sdn Bhd and Jenama Evolusi Sdn Bhd (garnishee)* [2010] MLJU 516 and *Pernas Trading Sdn Bhd v Senali Construction Works Sdn Bhd & Anor* [1991] 3 CLJ Rep 439 as main justification to the proposition that in garnishee proceedings, the burden falls of the garnishee to disprove owing money to the judgment debtor. The Judicial Commissioner failed to take into account that none of these cases were factually similar to the case in hand nor did they deal with a situation where garnishee is clearly disputing liability completely.

G

H

11. The issue of burden was recently clarified in the Singapore Court of Appeal in the case of *The State-Owned Company Yugoimport Sdpr (Also Known As Yugoimport-Sdpr) v Westacre Investments Inc and Other Appeals* [2016] 5 SLR 372 where it was held that, 'the legal burden remained on the judgment creditor to prove the existence of such a debt if this was disputed by the garnishee and the matter proceeded for determination either summarily or at trial'.

I

12. Based on the reasoning of the Singapore Court of Appeal decision, then the whole basis of the judgment falls. The Respondent will have to actually prove its

- A** claim during the garnishee trial. No evidence was put forth by the Respondent here other than his baseless and unsubstantiated, 'beliefs'.
13. There are other reasoning/propositions in the Grounds which are both factually and legally wrong which are dealt in detail in the Submissions, among them are:
- B** a. That payments made prior to the service of the order nisi is recoverable subsequently by the garnishor.
- b. During a garnishee trial, the Court may assess and determine the contractual relationship between the garnishee and the JD prior to the garnishor's judgment against the JD despite there being no evidence from the JD;
- C** c. That the burden of proof for a garnishor is less than normal wherein the Courts can take a 'relaxed and informal assertion' by the garnishor as real evidence.
- D** d. That if there is no debt owed by the garnishee, the relief would be to set aside the order nisi rather than to come to court and dispute its liability during the show cause.
14. Accordingly, the Appellants pray for this appeal to be allowed with cost.
- E** [14] We have read the appeal records and the submission of the learned counsel. After giving much consideration to the submission of the learned counsel for the appellant, we take the view that on the special facts of this case, the appeal must be dismissed. Our reasons, inter alia, are as follows:
- F** (a) in the instant case the learned counsel for the appellant was not able to demonstrate that the discretion vested with the court was wrongly exercised or has failed to take into consideration the relevant matters before it or has taken into consideration, consideration not before it. The memorandum of appeal also does not say so, which we think is fatal to the appeal;
- G** (b) the learned trial judge had heard both parties evidence ie oral and documentary and chose to conclude that the appellant was liable and had given the grounds for doing so;
- H** (c) the instant case is not one where the appellant disputes liability to pay the JD but it was related to quantum. The issue of quantum was tried and the learned trial had come to a decision, based on facts and evidence, conduct and demeanour of witnesses; and
- I** (d) we do not think on the facts of the case and the manner the appellant had chosen to lead its evidence, the conduct and demeanour of witnesses and narrative inclusive of the memorandum of appeal to resist the claim, it would be proper for appellate intervention in the exercise of a discretionary power of the High Court.

[15] For reasons stated above, we dismiss the appeal with costs of RM20,000. subject to allocatur. Deposit to be refunded. A

We hereby order so.

Appeal dismissed with costs of RM20,000. B

Reported by Kohila Nesan

C

D

E

F

G

H

I